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CURRENT TOPICS.

Now that the cholera is coming, and the chances are that the pleasure of many will be disturbed, it will do no one harm to know his legal rights (not against the cholera, of course). One Levy claimed in the city court of New York in his recent case against one Corey, that he had been compelled to pay Corey a check of $2,500 in order to prevent the latter from carrying out his threats to remove his (Levy's) wife from the hotel by reason of her being dangerously ill with the typhoid fever, which she had contracted there. Corey claimed that the payment had been made in pursuance of an amicable arrangement. The point on voluntary payment may be the most important. Said McAdam, C. J., in charging the jury:

"This action is of importance, not only to hotel-keepers, particularly those keeping summer resorts, and whose patronage, limited as it is to about three summer months, must, in the nature of things, depend largely upon the healthfulness and reputation of their house and its surroundings, but also to that portion of the general public who seek health, fresh air and recreation during that period in country places where they expect, according to their circumstances, to recuperate mind and body. With this admonition, given to exact, careful deliberation on your part, I will, without reciting the facts detailed to you by the evidence, and commented upon by counsel in their summing up, content myself by submitting to you the legal propositions on which you are to find. I charge you, as matter of law—

"*First.* That where a guest is taken ill at a hotel, with a contagious disease, likely to be communicated to others, the proprietor, after notifying the sick guest to leave, has the right to remove such guest in a careful and becoming manner, and at an appropriate hour, to some hospital or other place of safety, provided the life of the guest be not imperiled thereby. This is not only a right inherent in the hotel-keeper, but a duty owing to the other guests, and to the preservation of the public health.

"*Second.* If the hotel-keeper exercises these rights at an improper time, or in an illegal and unbecoming manner, he is liable, therefore, on the ground of negligence, or for abuse of authority.

"*Third.* The hotel-keeper has the right, under the circumstances before detailed, to make any reasonable arrangement for extra compensation, the amount of which is left largely to the mutual agreement of the parties in interest, and when they mutually agree in respect thereto, the law will infer that the price agreed upon is fair and just, and the burden of proving the contrary is on him who alleges imposition, or undue advantage. The agreement to be legal, however, should be voluntary, and the result of mutual assent in respect to which the minds of both parties should meet.

"*Fourth.* If, however, the hotel-keeper, not content to join in an agreement founded on mutual assent, determines to take advantage of the misfortune which has occurred in his house, makes threats to remove the guest when not in a condition to be removed, or threatens to remove such guest at a time or in a manner not warranted by the circumstances, and by force of such threats exacts from such guest, or her husband, a sum of money arbitrarily named by him, and not fixed by voluntary assent, nor warranted by the exigencies of the occasion, he commits a wrong which the law will not tolerate; he has exacted the money so obtained by duress and acquires no title to it, and it can be recovered back by the person from whom it was wrongfully exacted.

"*Fifth.* I do not tell you there was either duress or imposition in this case, that is a question exclusively for you. If there was no duress, and the money was voluntarily paid, or paid by force of the exigencies of the occasion, and without unlawful threats or restraint, it will be your duty to find a verdict in favor of the defendant.

"*Sixth.* If, on the other hand, you find that there were threats made by the defendant to remove the guest at an improper time, or in an improper manner, and the defendant had the means of carrying these threats into execution, and the plaintiff, fully believing that the defendant meant to put them in execution, and has just reason to believe that the execution of such threats would result in death to his wife, the plaintiff, as her husband and protector, had the right to pay the sum demanded, without losing his privilege of suing the defendant to recover back the money paid, on the ground that the payment was not voluntarily made, but was the sole result of coercion, duress, and fear. If, therefore, you find that the money was paid under these circumstances, and solely by reason of coercion, duress, and fear, exercised and caused by the defendant, you may find a verdict in favor of the plaintiff for the amount claimed.

"*Seventh.* Dispose of this case conscientiously, without fear, favor, or prejudice, and let the result of your conscientious convictions be recorded in the verdict you may render. We do not sit to teach lessons, nor to punish people merely because they have acted differently from what we might have done under similar circumstances. We sit to pass on the legal rights of litigants, and to deal out that justice, simple and pure, which the facts as established by the evidence entitle them to. Do this in the present instance without regard to consequences."

THE TRANSPORTATION OF LIVE-STOCK.

With the increasing importance of the cattle business in the West, and the growing demand for transportation of cattle to the eastern markets, the law governing the interests of shippers and the liabilities of railroad companies becomes prominent. Twenty years ago decisions on the subject were few, and the principles of the law of common car-

riers were applied sparingly and with doubt, but to-day opinions and *dicta* have so multiplied that an article upon the law of cattle transportation may be written without a reference to the analogous subject, the carriage of goods and merchandise. And it is practically American law, by reason of the vastness of our grazing territory and the unprecedented number of our railroads. In England the transportation of cattle is the matter of a day; with us, often of a week, in which time the cattle must be fed and watered, and accommodations be made for their comfort.

The purpose of this article is to treat of the liabilities of carriers in the transportation of live-stock, and their attitude towards the shipper.

More than one hundred years before railroads were constructed, Lord Holt said in speaking of the common carrier: "The law charges this person, thus intrusted to carry goods, against all events but acts of God and of the enemies of the King."[1] This statement of the carrier's common law responsibility, founded on public policy, has been the corner stone of the law on the subject in England and America to this day. It has been questioned both here and there, whether Lord Holt's rule, which makes the carrier an insurer of the goods intrusted to him, attaches to the carrier of live-stock, but the weight of authority is against these decisions which would seem to interfere with the logic and symmetry of the law. The arguments used to question the application of the rule have been, that the transportation of live-stock was formerly unknown, and that the arrangements and peculiar care it devolves upon the carrier impose a responsibility that could not have been contemplated when the rule was made.[2]

It is true that the care and responsibility are great, by reason of the animate nature of the thing carried, that its needs of air, light and attention, that its weakness, fear, viciousness, its tendency to refuse food, and to trample and kick its fellows during transportation,[3] are elements that do not enter into the carriage of inanimate things which may be stowed securely away and closed up until arrival at the place of consignment. But it has been answered that "the character of the property carried and the liability of its inherent qualities to work loss or injury to itself unaffected by any act of the carrier" were always considered in measuring his responsibility,[4] as where liquids evaporate, casks leak, fruit decays, or meat taints;[5] and that this principle should be applied to every new species of freight that becomes the subject of transportation.[6] Many and increasing kinds of property that were unknown to the common law are carried by rail today,[7] as, for instance, petroleum, and nitroglycerine and other explosives; and Mr. Schouler says very pertinently: "The ancient carrier's wagon did not, it is true, transport live-stock to anything like the extent of modern railway cars, but a bird in a cage, a dog fastened by a cord, or a young lamb, must occasionally have been thus transported for hire."[8] Where the community can be taxed in aid of a railroad's construction, it is said that, "Receiving funds of the public to aid in constructing, and then claiming to be simply private carriers in transporting for that public presents an unseemly contradiction."[9] And that is the question. Is a railroad company or other common carrier to be a private carrier as to live-stock, and accordingly liable only for the want of ordinary care and diligence, or is it to be answerable to the common law liability of an insurer with the reasonable qualifications? On the weight of authority no doubt can exist. In England the effect of the Railway and Canal Traffic Act,[10] which regulated the liability of the car-

1 Coggs v. Bernard, 2 Ld. Raymond, 909, 918.

2 R. Co. v. McDonough, 21 Mich. 169; Lake Shore & M. S. R. Co. v. Perkins, 25 Mich. 329; Louisville R. Co. v. Hedger, 9 Bush. (Ky.) 645; Pardington v. South Wales R. Co. 1 Hurls. & Nor. 392; M'Manus v. Lancashire & Y. R. Co., 4 Hurls. & Nor. 346.

3 Chicago, R. I. & P. R. Co. v. Harmon, 12 Brad. (Ill.) 54; Evans v. Fitchburg R. Co., 111 Mass. 142; Craigin v. N. Y. Cent. R. Co., 51 N. Y. 61; Virginia & T. R. Co. v. Sayers, 26 Gratt. (Va.) 328.

4 Chicago, R. I. & P. R. Co. v. Harmon, 12 Brad. 54.

5 Hudson v. Baxendale, 2 Hurls. & Nor. 575; Warden v. Greer, 6 Watts 424; Powell v. Mills, 37 Miss. 691; Story on Bailm. sec. 492; Swetland v. Boston & A. R. Co., 102 Mass. 276; Brown v. Clayton, 12 Ga. 566.

6 Chicago, R. I. & P. R. Co. v. Harmon, *supra* McCoy v. K. & D. M. R. Co. 44 Iowa, 424.

7 Kans. Pac. R. Co. v. Nichols, 9 Kans. 235.

8 Schouler Bailm. & Car., 341, note.

9 Kans. Pac. R. Co. v. Reynolds, 17 Kans, 251.

10 17 & 18 Vict. 31.

rier in the carriage of animals and goods, was to make railroads common carriers of live-stock.

But it has been uniformly held that, to protect the carrier against the unusual risk of transporting live-stock, it may reasonably restrict its common law liability by special contract with the shipper, but cannot exempt itself from loss or injury resulting from its own negligence.[11] In England, by statute, a railroad company may restrict its liability by any special contract that in the opinion of the judges shall be "just and reasonable."[12] But in Iowa[13] statute forbids the carrier to restrict the liability that exists at common law.

In New York[14] and Canada,[15] the carrier may even exempt itself by special contract from liability for loss or injury that may result from the negligence of its servants. In Maynard v. Syracuse & R. Co., one of the New York cases cited, Chief Justice Church said, alluding to the doctrine in that State: "The remedy is with the legislature, if remedy is needed," and Mr. Justice Davis in Stimson v. N. Y. Cent. R. Co.:[16] "The fruits of this rule are already being gathered in increasing accidents through the decreasing care and diligence on the part of these corporations, and they will continue to be reaped until a just sense of public policy shall lead to legislative restriction upon the power to make this kind of contract." But as illustrating a tendency to acknowledge that the courts of New York have gone too far in favoring the carrier, it is there held that when general words in a contract of shipment may operate without including exemption from liability for negligence, they will be so construed.[17]

The carrier in transporting live-stock cannot restrict its common law liability by notice on a placard, bill of lading or receipt; the notice must be embodied in a special contract with the shipper.[18]

Railroad companies are ready to assume the full liability of the common law, in the transportation of live-stock, if the shipper will pay a considerably higher rate than that which is charged him when he signs the special contract. In this contract the carrier attempts to guard against all risk, save from its own negligence, which calculation and experience can suggest; accordingly the contract contains stipulations that exempt the carrier from liability for loss or injury that the shipper may sustain in consequence, not only of the live-stock being wild, vicious, frightened, of escape and maiming, but in consequence of delay, heat, overcrowding, suffocation, imperfect cars, (shipper to examine), and other contingencies. Often it is provided that the shipper or his agent, in consideration of a free pass, shall go with the cattle to load, unload, feed and care for them. A very good example of such an iron-clad contract is found in Squire v. N. Y. Cent. R. Co.[19]

The rate at which the railroad company is willing to assume the unrestricted liability is always so high that to pay it in this day of competition would prove ruinous to the cattle owners' business.[20] In one case the alternate rates were $113 and $36 per car-load, which led the court to say: "This case is a strong illustration of how completely parties are in the power of the railroad companies, and how necessary it is to stand firmly by those principles of law by which the public interests are protected."[21] "The shipper in

11 South Alabama R. Co. v. Henlein, 52 Ala. 606; Mitchell v. Ga. R. Co. 68 Ga. 644; Ga. R. Co. v. Spears, 66 Ga. 485; Same v. Beattie, 66 Ga. 438; Ill. Cent. R. Co. v. Crabtree, 19 Ill. 136; St. Louis, K. C. & N. R. Co. v. Piper, 13 Kans. 510; Chicago St. L. & N. O. R. Co. v. Abels, 60 Miss. 1017; Rice v. Kans. Pac. R. Co. 63 Mo. 314; Oxley v. St. Louis, K. C. & N. R. Co., 65 Mo. 629; St. Louis, K. C. & N. R. Co. v. Cleary, 77 Mo. 634; Dawson v. St. Louis, K. C. & N. R. Co., 76 Mo. 514; Welsh v. Pittsburg, F. W. & C. R. Co., 10 Ohio St. 65; Kimball v. Rutland & B. R. Co. 26 Vt. 247; Virginia & T. R. Co. v. Sayers, 26 Gratt. (Va.) 328; Squire v. New York Cent. R. Co., 98 Mass. 239; Nashville & C. R. Co. v. Jackson, 6 Heisk. (Tenn.) 271.

12 Railway & Canal Traffic Act, 17 & 18 Vict. ch. 31.

13 Code of Iowa, sec. 1308.

14 Poucher v. N. Y. Cent. R. Co., 49 N. Y. 263; Craigin v. N. Y. Cent. R. Co., 51 N. Y. 61; Mynard v. Syracuse & R. R. Co., 71 N. Y. 180.

15 O'Roarke v. G. W. R. Co., 23 Q. B. 427; Hood v. Grand Trunk R. Co., 20 C. P. 361.

16 32 N. Y. 333.

17 Mynard v. S. B. & N. Y. R. Co., 71 N. Y.; Holsapple v. Rome, W. & O. R. Co., 86 N. Y. 275.

18 Code of Georgia, sec. 2068; Ill. Rev. Sts. p. 1159, sec. 82; Railway & Canal Traffic Act, 17 & 18 Vict. c. 31; Ga. R. Co. v. Spears, 66 Ga. 485; Indianapolis & St. L. R. Co. v. Jurey, 8 Bradw. 160; Wabash, St. L. & P. R. Co. v. Black, 11 Bradw. 465; Chicago, R. I. & P. R. Co. v. Harmon, 12 Bradw. 54.

19 98 Mass. 239.

20 Railroad v. Lockwood, 17 Wall 369.

21 Virginia & T. R. Co. v. Sayers, 26 Gratt. 328.

most cases, from motives of convenience, necessity, or apprehended injury, feels obliged to accept the terms proposed by the carrier, and practically the contract is made by one party only, and should therefore be construed most strongly against him."[22]

It follows, then, that the decisions of late years have had to do with the question whether a loss or injury to live-stock, such as death, escape, shrinkage, bruises, lameness, etc., has been caused by the negligence of the carrier in the matters of delay, heat, suffocation, defective cars, and other causes from liability for which it has endeavored to exempt itself in the contract.

There is often inserted in the contract a stipulation that in case any claim for damages is to be made, notice of the same must be given in writing within a certain time. Such a stipulation is reasonable, not being a limitation of the common law duty to safely deliver property received for shipment, and the notice must be so given as a condition precedent to a right of action.[23] Such stipulations should be reasonably construed in their application to the facts of each case. So where it was provided that the notice in writing must be given before the animals should be removed from the place of destination and before mingling with other stock, the owner was not required to give the notice when he declined to receive an injured mule and it was allowed to run at large on a common, on the ground that there was no removal or mingling in the sense of the stipulation.[24] And where the notice was to be given at the time of unloading, and animals injured and detained by an accident arrived at midnight, a verbal notice at the time and one in writing three days later, the stock having been moved to premises where the company could examine them, were considered a sufficient compliance with the stipulation.[25]

The notice must be given, too, although the shipper signs the contract without reading the stipulation, after the cattle have been loaded on the cars on a verbal understanding as to the terms of shipment.[26] But the stipulation, to effect the purpose intended, must distinctly state that no right of action is to exist after failure to give the notice; vague expressions will not be so construed. So the following stipulation was held not to be operative: "Claims for loss and damage must be presented in 30 days from date of shipment in order to receive attention."[27]

It is usual to give a drover, or a servant of the shipper, a free pass with the stock in consideration of his care of it during transit. He is entitled to the same consideration as a passenger, although the ticket contains a release of the company from liability for his personal safety,[28] except in New York.[29] It has been held that a drover's pass and the special agreement of transportation constitute a single contract, and that, therefore, the drover is a paying and not a gratuitous passenger.[30]

In the absence of a special contract, the fact that the shipper of a horse is allowed to pass on the same train is not conclusive that he is to attend to its safety during the journey.[31]

It is the duty of the carrier to provide safe, sufficient and suitable cars, with skilful servants for the transportation of live-stock.[32] And the carrier will be liable for the neglect of this duty even though the restiveness or viciousness of the cattle may have contributed to the injury.[33] Where, by reason of a defective car, the shipper was obliged to change his cattle to another car without an opportunity to provide it with bedding, and the animals got down and were injured, the carrier was liable.[34] But if the shipper re-

[22] Mynard v. Syracuse & R. R. Co. 71 N. Y. 180.
[23] Wabash, St. L. & P. R. Co. v. Black, 11 Bradw. 465; Dawson v. St. Louis, K. C. & N. R. Co., 76 Mo. 514; Moore v. Great Nor. R. Co., 8 L. R. Ir. 95.
[24] Chicago, St. L. & N. O. R. Co. v. Abels, 60 Miss. 1017.
[25] Rice v. Kans. Pac. R. Co., 63 Mo. 314.
[26] St. Louis, K. C. & N. R. Co. v. Cleary, 77 Mo. 634.
[27] Dunn v. Hannibal & St. J. R. Co., 68 Mo. 868.
[28] Flinn v. Phil. W. & B. R. Co., 1 Houst. (Del) 469; Virginia & T. R. Co., 26 Gratt. (Va) 328; Penn. R. Co. v. Henderson, 51 Penn. 315.
[29] Poucher v. N. Y. Central, 49 N. Y. 263.
[30] C. P. & A. R. Co. v. Curran, 19 Ohio St. 1.
[31] Clarke v. Rochester & S. R. Co., 14 N. Y. 571.
[32] Indianapolis, B. & W. R. Co. v. Strain, 81, Ill. 504; Indianapolis & St. L. R, Co. v. Jurey, 8 Bradw. 160; Wab , St. L. & P. Co. v. Black, 11 Bradw. 465; Kimball v. Rutland & B. R. Co., 26 Vt. 247. Laws of Kans., 1883, ch. 124, sec. 9; M'Mann v. Lancashire & Y. R. Co., 4 Juris. & Nor. 327; Combe v. London, &c. R. Co., 31 L. T. 613.
[33] Rhodes v. Louisville & N. R. Co., 9 Bush (Ky) 688; Smith v. N. H. & N. R. Co., 12 Allen, 531.
[34] McDaniel v. Chicago & N. W. R. Co., 24 Iowa, 412.

fuses the cars of the contracting company and selects those of another, which are defective, he cannot charge the carrier with resulting loss or injury, without proving knowledge of the defects.[35] A carrier may throw upon the shipper by special contract the burden of deciding whether a car is safe for the transportation of live stock.[36] This suggests the query, whether it is not the duty of the carrier to run cars that are secure and no others, and whether in its business of transporting animals it should not be more familiar than the shipper with the construction and safeguards that make cars suitable. This view seems to be supported in England.[37] Where a shipper, under special contract, was to take all risk arising from defects in the cars, and was to examine them; and he, after pointing out insecure fastenings which the company's agent promised to repair the next day and did not, decided to ship for a market; and some animals escaped and were lost in transit, the carrier, as it had knowledge of the defects, was held to be guilty of negligence and liable.[38]

In the absence of a stipulation that the shipper shall see to the loading of his animals, it is the duty of the company's servants to attend to it. Where the shipper voluntarily relieves the carrier of his duty, and improperly loads the cattle, he cannot hold it liable for resulting injury.[39] And where the stipulation is that the shipper shall load, and he allows the carrier's servants to load, and they overcrowd the animals, he must bear any loss himself.[40]

It has been held in Georgia, that where a carrier contracted with the shipper for exemption from liability for loss that might occur from overcrowding, but did not impose upon the shipper the duty of loading, and hogs so shipped died from overcrowding, the carrier was not liable.[41] It would seem as the latter was the cause of the overcrowding, the case is of doubtful, if of any, authority. A carrier should have facilities for unloading whenever by reason of delay or other cause, not attributable to the shipper, it becomes necessary to unload animals to be fed and watered. So that where a company contracted to transport beyond its own line, and restricted its liability except for negligence, and at the junction there were no cars of the connecting road in readiness, it became the duty of the company, to prevent the damage to the cattle, to unload and to feed and water them, although by the terms of the special contract the shipper was to care for the animals during transportation.[42]

It is the duty of a carrier to receive all freight offered within the scope of its business, and safely to transport it without unnecessary delay, and within a reasonable time.[43] For failure in this respect the carrier will, if negligent, be liable for resulting loss of market to the cattle or other injury, although there may be an exemption from liability for delay in the special contract. An unconstitutional law prohibiting railway companies from carrying Texas or Cherokee cattle will not relieve the carrier from the duty to receive and transport. Failure to forward cattle received from a connecting line on Sunday will not be excused, as the forwarding is considered a work of necessity.[44] But the carrier is required only to ship in a reasonable time under ordinary circumstances, and is not bound to use extraordinary efforts, or to incur extra expense in order to surmount obstructions; as where a mob of strikers, not at the time employed by a railroad company, overpower the train hands and refuse to let the cars proceed,[45] or where a heavy snow storm blocks the track.[46] The detention of a train over time to load a shipper's stock, at his request, as it is the act of the company, cannot in the event of a collision be regarded in the light

[35] Ill. Cent. R. Co. v. Hall, 58 Ill., 409.
[36] Squire v. N. Y. Cent. R. Co., 98 Mass., 239; Harris v. N. I. R. Co., 20 N. Y. 232.
[37] Gregory v. West Mid. R. Co., 2 H. & C., 944.
[38] Welsh v. Pittsburg, F. W. & C. R. Co., 10 Ohio St. 65.
[39] Ohio & M. R. Co. v. Dunbar, 20 Ill. 723; East Tenn. & Ga. R. Co. v. Whittle, 27 Ga. 535; Chicago & N. W. R. Co. v. Dresor, 22 Wis. 511.
[40] Squire v. N. Y. Cent. R. Co., 98 Mass., 239.
[41] Mitchell v. Ga. R. Co., 68 Ga. 644; But see Sturgeon v. St. L., K. C. & N. R. Co., 65 Mo. 569; Ritz v. R. R., 3 Phil. R. R. 82.
[42] Dunn v. Hannibal & St. J. R. Co., 68 Mo., 268.
[43] South Ala. R. Co. v. Henlein, 52 Ala. 606; Chicago & A. R. Co. v. Erickson, 91 Ill. 613; Wab., St. L. & P. v. Black, 11 Bradw. 465.
[44] Chicago & A. R. Co. v. Erickson, 91 Ill., 613; Phil., W. & B. R. Co. v. Lehman, 56 Md. 209.
[45] Indianapolis & St. L. R. Co. v. Jungten, 10 Bradw. 295; Lake Shore & M. S. v. Bennett, 89 Ind. 457.
[46] Ballentine v. Nor. Mo. R. Co., 40 Mo. 491; Penn. v. Buff. & E. R. Co., 49 N. Y. 204; Briddon v. Gt. North. R. Co., 28 L. J. Exch. 51.

of contributory negligence.[47] If cattle are placed in cars in readiness for a regular train which does not take them, the carrier is liable for shrinkage of the cattle caused by the delay; and if the regular train is a night train, there is no duty imposed on the owner to unload during the night to avoid shrinkage, although he decides not to let the company complete the transportation.[48] A carrier cannot be excused from the consequences of delay on the ground that it was caused by a lack of proper appliances for transportation, as where hogs were not taken by the regular train, thereby losing a market, because, as the company's witness testified, the engine scattered sparks in such a way as to be likely to set fire to the straw in which the hogs were bedded.[49]. Where under a special contract the shipper of cattle agreed to load and unload (the carrier to furnish assistance as required) and to assume the risk of delays, and during transportation the train was delayed by a snow storm for three days at a point separated from the usual place of unloading by another train of cars, it was held that, as the provision for assistance by the company had reference to the terminus of the transportation, it was under no duty to furnish facilities for unloading at an intermediate point.[50]

In the case of a similar contract, where the cars were stopped by a flood, it was held to be the duty of the company to so place the cattle cars as to be convenient to the usual and accessible means of unloading.[51]

Where stock is shipped under a special contract, providing that the shipper shall feed and water the animals, and they are carried beyond their destination, the company is liable for the extra expense of feeding.[52]

It is the duty of a carrier to throw water on overheated hogs in danger of perishing, and, when there is a prevailing custom to use water for that purpose, failure to apply it is gross negligence; and the duty attaches whether or not the contract stipulates that the shipper is to care for the animals in transit, because the company is presumed to be familiar with its watering facilities; it is *prima facie* evidence of negligence that a pump on the road is not available from want of repair.[53] A shipper is not required to give a carrier special information about the physical condition of an animal offered for transportation; so where a valuable cow eight months with calf lost it by an injury resulting from the company's negligence, liability could not be lessened on the ground that the carrier should have been informed of the cow's condition.[54]

Where a carrier makes an unconditional, though verbal, agreement to furnish cars to transport live-stock on a day certain, neither inevitable accident nor unavoidable delay will excuse performance.[55] Where a horse while being transported (not under a special contract) was strangled by its halter, it was a question for the jury whether the carrier should not have stationed one of its servants in or about the car to observe the condition of the animal from time to time.[56] To switch off car-loads of cattle to a side track where they are not accessible to be unloaded, fed or watered, and leave them there for two or three days, is an entire abandonment for the time of all effort to perform the contract of shipment, and the carrier is liable for resulting loss, although the shipper was to assume the care and risks of transportation, and the carrier to forward at convenience.[57] The words, "At owner's risk," inserted in a shipping contract do not relieve the carrier from liability for its negligence; they mean simply that the owner is to take the ordinary and known risks of transportation.[58]

Where a carrier contracts to forward cattle to a point beyond its own line, with the stipulation that it and connecting companies shall incur no liability except for negligence, and the shipper sustains damage in the nature of shrinkage, extra feed bills, loss of market, or from any cause, through the negligence of a connecting company, he must look to the

[47] Flinn v. Phil. W. & B. R. Co., 1 Houst (Del) 469.
[48] Ill. Cent. R. Co. v. Waters, 41 Ill. 73.
[49] Tucker v. Pac. R. Co., 50 Mo. 385.
[50] Penn. v. Buff. & E. R. Co., 49 N. Y. 204.
[51] Bills v. N. Y. Cent. R. Co. 84 N. Y. 5.
[52] Bryant v. S. W. R. Co., 68 Ga. 805.
[53] Toledo, W. & W. R. Co. v. Thompson, 71 Ill. 434; Ill. Cent. R. Co. v. Adams, 42 Ill. 474; Toledo, W. & W. R. Co. v. Hamilton, 76 Ill. 393.
[54] McCune v. B. C. R. & N. R. Co., 52 Iowa 600.
[55] Harrison v. Mo. Pac. R. Co., 74 Mo. 364.
[57] Clarke v. Rochester & S. R. Co., 14 N. Y. 571; and see Porterfield v. Humphreys, 8 Humph. (Tenn) 497.
[57] Keeney v. Grand Trunk R. Co., 47 N. Y. 525.
[58] Nashville & C. R. Co. v. Jackson, 6 Heisk, (Tenn) 271.

contracting carrier for damages.[59] An intermediate carrier receiving cattle billed to a place beyond its terminus, in the absence of a stipulation as to the time of delivery, is to forward them to the succeeding carrier within a reasonable time, and is liable for the consequences of avoidable delay.[60] If a carrier contracts to forward cattle to a point beyond its own line, but stipulates that it shall incur no liability after a delivery to the connecting carrier, the shipper's remedy is against the latter, if he is damaged on its line, and the carrier thus sued can plead in defence any exemptions embraced in the contract of the first receiving carrier;[61] and this, the American doctrine, on the ground that as the contract contemplated the employment of a connecting carrier the law will imply sufficient privity between the shipper and the connecting carrier to enable the action to be maintained. But the English doctrine is contrary, on the ground that the contract is entire and cannot be split up.[62]

"In all cases of loss by a common carrier the burden of proof is on him to show that the loss was occasioned by the act of God or by the public enemy."[63] The shipper of live-stock under an ordinary special contract, sustaining damage, is bound only to prove a delivery to the carrier, and a failure on its part to deliver safely, upon which the latter, to exempt itself, must set up the special contract and show that the injury came within it, and without negligence of the carrier;[64] but if it appears that the negligence of the carrier mingled actively and co-operatively with the cause of damage exempted in the contract, then the carrier will be liable.[65] Where, however, the contract of shipment releases the carrier from all liability, except for negligence, as when the owner is to take entire care of his stock during transit, the owner, in order to recover for loss or injury to cattle, must prove negligence on the part of the carrier.[66]

A stipulation, in consideration of reduced freight, arbitrarily fixing the value of an animal in case of loss at a certain sum, is, with some authorities, the measure of value, on the ground that the stipulation is intended to adjust the measure of liability to the reduced freight charged, and to protect the carrier against the exaggerated valuations set upon blooded horses and fancy stock.[67] But the better opinion seems to be that such a stipulation is void as releasing the carrier from a proper liability for its own negligence.[68] Contention on the subject is avoided by a tariff of two rates, one fixed, and the other sliding or proportionate to the valuation set upon the animal by the owner.[69] Where a shipper fixes the value of a costly animal at a low figure in order to secure cheap transportation, he can recover no more than the amount represented as value, on the ground that to permit him to recover more would be a fraud on the carrier.[70]

The measure of damages where there has been a failure to deliver cattle at a time agreed upon, is the difference in value at the time of actual delivery and the market value at the time of delivery fixed in the contract;[71] and the shipper is also entitled to recover for losses caused by the detention and extra expense of care and feed.[72] But the fact that the shipper intended the cattle for a market beyond the terminus of the carrier's line, where a higher price could have been realized, is immaterial, the carrier being responsible only, in the absence of a "through" contract, for a failure to deliver at his own

[59] St. Louis, K. C. & N. R. Co. v. Piper, 13 Kans., 505.

[60] Phil. W. & B. R. Co. v. Lehman, 56 Md. 209; Myrick v. Mich. Cent. R. Co., 107 U. S. 102.

[61] Halliday v. St. Louis, K. C. & N. R. Co., 74 Mo. 159.

[62] Coxon v. Gt. Western R. Co., 5 Hurls. & Nor. 272.

[63] 2 Greenl. on Evi., sec, 219; Toledo W. & W. R. Co. v. Durkin; 76 Ill. 395; McCoy v. K. & D. M. R. Co., 44 Iowa, 424; Evans v. Fitchburg R. Co., 111 Mass., 142.

[64] South Ala. R. Co. v. Henlein, 52 Ala. 606; Chicago, St. L. & N. O. R. Co. v. Abels., 60 Miss., 1017.

[65] Oxley v. St. Louis, K. C. & N. R. Co., 65 Mo., 629.

[66] St. Louis, K. C. & N. R. Co., v. Piper, 13 Kans. 510; Louisville, C. & L. R. Co., 9 Bush, (Ky.) 645.

[67] South Ala. R. Co. v. Henlein, 52 Ala. 606; Squire v. N. Y. Cent. R. Co., 98 Mass. 239.

[68] Chicago, St. L. & N. O. R. Co. v. Abels, 60 Miss. 1017; Kans. C., St. J. & C. B. R. Co. 30 Kans. 645; Moulton v. St. Paul, M. & M. R. Co., 12 Am. & Eng. R. R. Cases 16, advance Minnesota.

[69] Harvey v. Terre Haute & I. R. Co., 74 Mo. 538; M'Cance v. London & N. W. R. Co., 3 H. & C. 343; Harrison v. London, etc. R. Co. 2 Best & Sm. 122.

[70] Harvey v. Terre Haute & I. R. Co. *supra*; McCance v. London & N. W. R. Co., *supra*.

[71] Smith v. New Haven & N. R. Co., 12 Allen 531; Sangamon & M. R. Co. v. Henry, 14 Ill. 156.

[72] Glascock v. Chicago & A. R. Co. 69 Mo. 589.

terminus.[73]

If hogs die in transit of suffocation resulting from the carrier's negligence, the measure of damages is the difference in value of the hogs when alive and when dead at the point of delivery.[74] If there is no stipulation as to the time of delivery, it must be shown, in order to recover for the loss of a market that the carrier had knowledge, or could infer from the circumstances of the case and the course of trade, that the animals were intended for such market.[75] Damage to cattle, improperly kept in cars, from shrinkage, is matter of opinion.[76] A carrier cannot be held responsible in damages to a shipper of stock when the loss results from a remote and extraordinary cause, as where a carrier changed from one car to another some cattle which were prohibited from coming into the State, and while the exchange was being made, the animals were seized by the authorities.[77] A recovery cannot be had for the loss of profits anticipated from letting a jack to mares, where the use to which the animal was to be put and the carrier's knowledge of the same, are not averred and proved.[78]

There are statutes in some States forbidding a railroad company transporting live-stock to confine the animals in its cars for more than so many hours without unloading for rest and feeding, unless the cars contain facilities for the purpose, and the time of confinement on a connecting line is to be reckoned in.[79]

In Maine Railroad companies are to give cars containing cattle a continuous passage in preference to other freight; animals are to be loaded so as to be able to stand comfortably; animals of one kind only are to be loaded in the same compartment, and young animals are not to be loaded with those large and mature, except in the case of dams with their own sucklings.[80] In Ohio, railroads and steamboats carrying live-stock and owning stock-yards, upon the discovery of contagious disease among the stock in their possession are to take active measures to prevent its spread, and are to disinfect cars and stalls.[81]

In Nebraska, railroads are to keep their stock cars clean, and to see that they are clean when they enter the State.[82] Finally, in Iowa, as we have noticed, the carrier of cattle and merchandise cannot exempt itself, by any contract, receipt, rule or regulation, from the liability of a common carrier.[83]

Boston, Mass. HENRY AUSTIN.

[73] Sangamon & M. R. Co. v. Henry, 14 Ill. 156.
[74] Sturgeon v. St. Louis, K. C. & N. R. Co., 65 Mo. 569.
[75] Phil. W. & B. R. Co. x. Lehman, 56 Md. 209.
[76] Ill. Cent. R. Co. v. Waters, 41 Ill. 73.
[77] McAllister v. Chicago R. I. & P. R. Co. 74 Mo. 351.
[78] C. B. & Q. R. Co. v. Hale, 83 Ill. 360.
[79] Code of Iowa, sec. 4032; Maine Rev. Sts. ch. 124, sec. 36; Gen. Laws New Hampshire, ch. 281, sec. 28; New York Rev. Sts. p. 1605; South Carolina Gen. Sts. sec. 1479; Vermont Rev. Laws, sec. 4185; Mass. Pub. Sts. ch. 207, sec. 55.
[80] Maine Rev. Sts. ch. 124, sec. 35.
[81] Code of Ohio, sec. 4212.
[82] Laws of Neb. 1877, ch. 149.
[83] Code of Iowa, sec. 1308; McDaniels v. Chicago & N. W. R. Co., 24 Iowa, 412.

BREACH OF CONTRACTUAL DUTY AS A GROUND FOR ACTION BY STRANGERS.

This subject came before Judge Deady, of the United States Circuit Court of Oregon, at so recent a date that the circumstances which gave rise to his decision are doubtless still fresh in the minds of all who read of them, but it will do no harm to say that there a title examiner employed by one about to lend money, reported the freedom of the title of the property which was to be the subject of the loan from defects and a purchaser of the mortgage relying upon such report purchased the mortgage and afterwards upon finding the estate to have been encumbered before, sued the examiner for the damage done. The court held that he owed no duty to the plaintiff and gave judgment for the defendant.[1]

It seems that in New Jersey the same principle which underlies Judge Deady's judgment came before the Supreme Court for application, in a case clearer than that before Judge Deady, but decided in the same way. One Ward made a contract with the boards of chosen freeholders of two counties for the

[1] The Dundee etc. Co. v. Hughes, 18 Cent. L. J. 70 (1884).

erection of a bridge over the Passaic river. He erected a temporary bridge, and, while the team of the Marvin Safe Co. was wending its way across the river, its driver little dreaming of the course of events, a fall of the structure, crash, broken teams and bones, a cold bath (for it was in November), and last, but not least, a suit for damages, Marvin Safe Co. v. Ward followed.[2] He resisted the suit on the ground that he was engaged in the performance of a contractual duty; that that duty was to the board of chosen freeholders; also, that he was liable for damages only to them, and submitted to the Supreme Court of the State that, if the plaintiff was to obtain satisfaction out of anybody, that he was not the man. His view was adopted.

The general rule of law is, that one who is not a party to a contract, cannot sue in respect of a breach of duty arising out of the contract.[3] The leading case on this subject is Levy v. Langridge.[4] There a stranger to the contract was allowed to sue, but the decision was expressly placed upon the ground of fraud. This case was succeeded in point of time by Winterbottom v. Wright.[5] In that case A contracted with the postmaster-general to provide a mail-coach to convey the mail-bags along a certain line; and B contracted to horse the coach along the same line. B hired C to drive the coach. It was held that C could not maintain an action against A for an injury sustained by him while driving the coach, by its breaking down from a defect in its construction. The ground of decision was that the defendant's duty with respect to the sufficiency of the coach arose from his contract; and, there being no privity of contract between him and the plaintiff, he was under no obligation to the plaintiff on which the latter could sue. Winterbottom v. Wright has been followed with constant approval in a series of decisions in the English courts.[6] Its standing as an authority was not impaired by the decision of the Court of Appeals in Heaven v. Pender.[7] No duty to a third person could arise out of a contract to which he was a stranger.[8] The reason on which this doctrine rests is obvious. The object of the parties in inserting in their contract specific undertakings with respect to the work to be done is to create obligations and duties *inter sese*. These engagements and undertakings must necessarily be subject to modifications and waiver by the contracting parties. If third persons can acquire a right in the contract in the nature of a duty to have it performed as contracted for, the parties will be deprived of control over their own contract—the employer will have taken from him the power to direct how the work shall be done, and the employe may find himself under responsibilities to third parties which do not exist between him and his employer. The inconvenience which would arise from allowing a third person to have such an interest in a contract to which he was not a party is referred to by Lord Abinger in Winterbottom v. Wright where he said: "The plaintiff in this case could not have brought an action on the contract; if he could have done so, what would have been his situation supposing the postmaster-general had released the defendant? That would at all events, have defeated his claim altogether. By permitting this action we should be working this injustice, that after the defendant had done everything to the satisfaction of his employer, and after all matters between them had been adjusted, and all accounts settled on the footing of their contract, we should subject them to be ripped open by this action of tort being brought against him."

"No injustice can arise from the application of the principle adjudged in Winterbottom v. Wright; for if the work contracted for be such as that a duty exists towards third persons with respect to it, the party who contracts to have the work done will be liable for damages arising from a breach of the duty, although the injury arose from the fault of the person with whom he contracted."[9] And he will have remedy over against the wrongdoer, either under his express contract to pay

[2] 17 Vrom. 19, (1884) not yet published except in advance sheets.

[3] Alton v. Midland R. R. Co., 19 C. B. (N. S.) 213.

[4] 2 M. & W. 519; s. c., 4 Id. 337.

[5] 10 M. &. W. 109.

[6] Longmeid v. Holliday, 6 Exch. 761; Blackmore v. B. & E. R. Co., 8 E. & B. 1035, 1049; Redie v. R. R. Co., 4 Exch. 244; Allen v. Midland R. Co., supra; Collis v. Selden, L. R., 3 C. P. 495; Whart. Neg., secs. 430, 440.

[7] 9 Q. B. Div. 503.

[8] Cuff v. N. & N. Y. R. Co., 6 Vroom 17, 574.

[9] Hole v. S. & S. Railway Co., 6 H. & N. 488.

damages, or under a contract to that effect which the law will imply.[10]

There is a class of cases in which a person performing service or doing work under a contract, may be held in damages for injuries to third persons, occasioned by negligence or misconduct connected with the execution of the contract; but these are cases where the duty or liability arises independent of the contract. Thus, a servant carried as a passenger under a contract to carry, made with his master, who purchased the ticket, may sue the carrier for personal injuries, or for the loss of his luggage, through the negligence of the carrier. Here the carrier's liability does not depend upon the contract; the fact that the servant is a passenger casts a duty on the carrier to carry him and his luggage safely. He may sue in case for a breach of that duty, but he could not sue upon the contract.[11] Dalyell v. Tyrer,[12] which is sometimes cited as being in conflict with Winterbottom v. Wright, belongs to the class of cases just mentioned. So, also, to quote the language of Parke, B , "if a mason contracts to erect a bridge or other work in a public road, which he constructs, but not according to contract, and the defects of which are a nuisance to the highway, he may be responsible for it to a third person who is injured by the defective construction, and he cannot be saved from the consequences of his illegal act by showing that he was also guilty of a breach of contract and responsible for it."[13] In cases of this description the wrong done and the liability for it are independent of the contract, and that liability is not taken away by the mere fact of the existence of a contract between the wrongdoer and some third person.

Nor does the fact that the contract relates to a structure for public use alter the case. In Robinson v. Chamberlin[14] and Johnson v. Belden,[15] the court held that individuals who, in pursuance of a statute, contracted with the State to keep the canals in repair were liable in damages for injuries to a canal boat caused by the want of repair of a lock. The liability was put upon the gronnd that the contractors were public officers, and that the contract to repair created a duty analogous to that which might arise from an obligation to repair by prescription *ratione tenure*, or by act of parliament.

But a wholesale druggist is responsible for his negligence in selling poison for a harmless drug to a retail druggist, who re-sold it to a consumer, who was injured by it.[16] And the court in a Massachusetts case went so far as to say that the builder of a railway carriage should be liable to every passenger injured by its defective construction.[17] So a stevedore, employed by another who contracted for the unloading of a vessel was permitted to recover against the vessel owner for injuries caused by the defective appliances furnished him.[17] In Dalyell v. Tyrer, before referred to, the defendant had let another his steamboat and crew, and he was held liable for the injuries caused by the mismanagement of the crew.[19] But a boiler maker has been held not responsible for injuries caused by an explosion.[20]

St. Louis, Mo. ELISHA GREENHOOD.

[10] Inhabitants of Woburn v. Henshaw, 101 Mass. 103; Chicago v. Robbins, 2 Black 418, s. c., 4 Wall. 657; City of Brooklyn v. Brooklyn City R. Co., 47 N. Y. 475, 481.

[11] Marshall v. York R. Co., 11 C. B. 655; Austin v. G. I. P. R. Co., L. R. 3 Exch. 9; Whart. Neg. sec. 439; Dicey on Parties 19.

[12] E. B. & E. 899.

[13] Longmeid v. Holliday, 6 Exch. 767; Collis v. Selden, L. R. 3 C. P. 495.

[14] 34 N. Y. 389.

[15] 47 Id. 130.

[16] Thomas v. Winchester, 6 N. Y. 397; s. c. Big. Lead. Cas. 602; Longridge v. Levy, 2 M. & W. 519; 4 M. & W. 337; Wellington v. Downer Oil Co. 104 Mass. 64.

[17] Davidson v. Allen, 11 Allen, 514.

[18] Coughlin v. The Rheorer, 19 Fed. Rep. 926.

[19] E. B. & E. 899.

[20] Losee v. Clute, 51 N. Y. 194. See note to case in 18 Cent. L. J. 472 for other cases.

TORT—EJECTION OF PASSENGER FROM RAILROAD TRAIN.

MURDOCK v. BOSTON & ALBANY R. CO.

Supreme Judicial Court of Massachusetts, June, 1884.

A railroad corporation, whose agent and ticket-seller has sold to a passenger a ticket having holes punched in it, explaining to him at the same time, the meaning thereof, and assuring him that it was good for the proposed trip, there being no mistake or interference on the part of the latter, and no notice to him from an inspection of the ticket or *aliunde* of its insufficiency, is liable to such passenger if it ejects him from its train before the completion of his journey, although the holes punched in such ticket signified, under the rules of the corporation for the instruction and guidance of its conductors, that it was insufficient

for the whole of such journey, and although the conductor, in demanding extra fare, offered to give a receipt therefor, stating the circumstances, so that, if such passenger's story were true, he might get back such extra fare.

Action of tort for ejection from the defendant's train at Pittsfield, and for false imprisonment in the lockup of that town. At the trial in the Superior Court, before Bacon, J., the jury returned a verdict for the plaintiff; and the defendant alleged exceptions. The material facts appear in the abstract of opinion.

A. L. Soule for the defendant. *R. M. Morse, Jr.* & *H. L. Harding*, for the plaintiff.

C. ALLEN, J., delivered the opinion of the court.

It appears that the defendant's agent and ticket-seller told the plaintiff that the two tickets would be good for a passage from Springfield to North Adams, and explained the meaning of the two punched holes in one of them, and, with a full understanding of exactly what the tickets were, and of what the plaintiff wanted, sold them to him as tickets good for his contemplated trip. There was nothing on their face to show the contrary to the plaintiff, and he took and paid for them on the strength of these explanations and assurances of the ticket-seller. There was no mistake on the part of either as to where the plaintiff wished to go, or what terms were actually expressed upon the tickets, or what marks or punched holes they bore. The circumstance of there being two tickets, and of the holes in one of them, naturally induced inquiry by the plaintiff, and he had no reason to distrust the correctness of the explanations which were given to him. The ticket-seller assumed to know, and gave assurances which the plaintiff had a right to, and which he did rely on. If, when the conductor refused to accept the punched ticket, it had appeared on an inspection of it that there had been a mistake, and that it did not on its face purport to be good for a passage over that part of the defendant's road, and that the ticket-seller had delivered to the plaintiff a ticket good upon some other railroad, or to some place which had already been passed when the mistake was discovered, and that the plaintiff had through inadvertence accepted a ticket which on its face was plainly insufficient, then this case would have fallen within the doctrine of the recent decision in Bradshaw v. South Boston R. Co. 135 Mass. 407; and it would have been the duty of the plaintiff to yield for the time being, and pay his fare over or withdraw from the car, unless a distinction should be taken between the rights of passengers upon steam railways and street railways under such circumstances; a question which we do not now consider. See also Cheney v. Boston & Maine R. Co. 11 Met. 121; Yorten v. Milwaukee etc. R. Co., 54 Wis. 234; Townsend v. N. Y. Central etc. R. Co., 56 N. Y. 295; Petrie v. Penn. R. Co., 13 Vroom. 449; Dietrich v. Penn. R. Co. 71 Penn. St. 432; Frederick v. Marquette etc. R. Co., 37 Mich. 342; McClure v. Phil. etc., R. Co. 34 Md. 532. But in the present case such is not the position of the parties. As has been seen, the plaintiff not only was not guilty of any negligence in accepting his ticket, but he examined it carefully, saw everything there was on it, and received explanations of the meaning of the punched holes, and assurances that the two tickets, in the condition in which they were, would be good for the trip.

In such a case, there being no mistake or inadvertence on the plaintiff's part, in the respects mentioned and the tickets which were delivered being in all particulars such as were intended to be delivered, and there being nothing which could be gathered by inspection to show that they were insufficient, and no notice of their insufficiency being given to the plaintiff by anybody or in any form until he had already entered upon and partially accomplished his journey over the defendant's road, he might well insist upon being allowed to complete that journey. If the defendant's superintendent or president, or both of them, had been standing by when the plaintiff purchased his tickets, and had heard and assented to what was said by the ticket-seller, and if they also were under the same mistake as to the the rules established for the guidance of conductors, the legal position of the plaintiff could hardly have been stronger than it is at present. It would still be the case that he took his tickets relying on the mistaken assurances of the defendant's agents in respect to their validity.

If the defendant, through any imperfection in its rules or methods, or any ignorance or violation of rules or instructions by its agents, has been led into any interference with the rights of the plaintiff under such circumstances, it must abide the consequences. To hold the contrary would throw a burden upon passengers such as is called for by no reason of necessity or expediency. On the other hand, it is no more than a wholesome requirement that railway companies should be responsible in damages for the consequences of a mishap, such as occurred in the present case. The conductor's explanation of the meaning of the two punched holes might or might not be correct; at any rate, their meaning was purely arbitrary, and, so far as the plaintiff could see, the conductor's interpretation was no more probable or intelligible than that given by the ticket-seller. The plaintiff had a right to act upon the explanations given him at the time when he bought his ticket. The mistake was that of the ticket seller in supposing that the punched holes signified that the ticket had been used only to Chester, whereas in fact, according to the defendant's rules for the instruction and guidance of conductors, they signified that it had been used to Pittsfield, a station further on. The offer of the conductor to give a receipt to the plaintiff for the additional fare which he demanded, stating the circumstances under which it was paid, so that the plaintiff

might get back the money if it should be found that his account of the purchase of the ticket was true, though showing good faith on the part of the conductor, did not have the effect to make it the legal duty of the plaintiff to pay the additional fare.

It follows that all the instructions were properly refused, except as modified by the presiding judge; and the instructions which were given were clearly and accurately expressed; Maroney v. Old Colony Railroad 106 Mass. 153.

Exceptions overruled.

NOTE.—See Walker v. Wabash St. L. & P. R. Co. 18 Cent. L. J. 394.

STATUTE OF FRAUDS—PAROL AGREEMENT TO CONVEY LAND—PART PERFORMANCE.

ANDERSON v. SHOCKLEY.

Supreme Court of Missouri, June. 2, 1884.

When a grandfather tells his grandson that he has bought land for him, to go ahead and use the land as his own and when he becomes convinced of his worth, he will convey it to him and he goes ahead and improves it, cultivates it, fences it, builds house and stable on it, sinks a well on it, and does various other things, this will entitle him to a decree vesting title in him to the land.

NORTON J, delivered the opinion of the court.

This is a suit in ejectment to recover the possession of 40 acres of land in the petition described. The answer of defendant among other things sets up that plaintiff is his grandfather and controlled and received the benefits of defendant's labor till he was 23 years old, that plaintiff became the owner of the land in 1867 and 1868 gave it to defendant but did not execute a deed therefor, that in the year aforesaid plaintiff told defendant that he had bought the land for him and requested defendant to take possession of it, clear the timber from it, fence and put it in cultivation, and improve it as his own property, and to use it as such, and that if defendant would do as above stated the land should be his after a certain time, or when defendant's diligence and thrift were demonstrated by such said improvement of the land; that pursuant to such request and agreement defendant in 1868 entered upon said land, began, and has ever since deadened trees, cleared the land, broke it up, put it in cultivation in good farmer-like manner, built a dwelling, stable, and other buildings thereon, with stock pens, dug a well for water, and set out fruit trees, in the doing of which defendant devoted his whole time, skill, and labor, and that he expended said time and labor in improving the farm, believing it to be his own, and relied in good faith in so doing upon the said promise of plaintiff. For a further defense the statute of limitations was pleaded. The answer concludes with a prayer that the court decree title to defendant for said land or that if plaintiff be allowed to recover on the legal title that a judgment for $2000 be given defendant for improvements made and that the judgment be declared a lien on the land. The replication puts in issue the matters set up in the answer. On a trial had before the court without the intervention of a jury the court rendered a decree vesting title in the defendant from which the plaintiff presents an appeal to this court. The following facts we think are established by the evidence: that defendant was the grandson of plaintiff and that he rendered service for plaintiff till he was about 23 years old, that plaintiff bought the land in controversy in 1867, and in 1868 agreed with defendant that he would make him a deed to the land if he would go on it, improve it, and make a living on it; that he put defendant in possession of the land, which, at that time, was unimproved; that defendant on the faith of said promise, took possession of the land as owner, cleared a greater portion of it of the timber, put it in cultivation, built a dwelling, fenced the ground, dug a well, and made other improvements; that defendant occupied said land under said agreement for about ten or eleven years before suit brought, two years of the time by a tenant to whom he had leased the land as his with the knowledge and assent of plaintiff. The court found these facts and based its decree upon them, and it is objected by plaintiff and appellant that they are not sufficient in law to warrant the decree. It is insisted by counsel that the contract relied upon is within the statutes of frauds, and is without consideration, and that, therefore, the decree is erroneous. The answer to this is that the evidence shows, and the court below so found that defendant in pursuance of and on the faith of said contract and offer of plaintiff entered into possession of it as owner, improved the same as set forth in the petition, thus bringing the case within the principle of the case of Desplan v. Carter, 21 Mo. 331 where it is said that "when a party has been let into possession of land under a contract, and has made valuable improvements, expended money in building or repairs, these acts have long been and I may say uniformly considered as taking the case out of the statute. If this were not so the party would be made the victim of a fraud practiced upon him. See also Gupton v. Gupton, 47 Mo. 37; Hiatt v. Williams, 72 Mo. 214; Sutton v. Hayden, 62 Mo. 100; Freeman v. Freeman, 43 N. Y. 34; Neal v. Neal, 9 Wall. 1; Hardesty v. Richeson, 44 Md. 617; 23 How. 347, 13 Vesey, 147; Bright v. Bright, 41 Ill. 97; Langston v. Bates, 84 Ill. 524. During the progress of the trial a witness was allowed to testify over plaintiff's objection as to the number of plaintiff's children and the amount of his property. Conceding that the evidence so received was irrelevant as the trial was by the court the presumption can be indulged

that the court gave no importance to it when it appears as it does in this case that without regard to such evidence the judgment is for the right party and it further appearing that the granting of a new trial for this error could not effect the final result we would not be justified in reversing the judgment as it is fully supported by the other evidence in the case Hedecker v. Ganghorn, 50 Mo. 154; Jackson v. McGruder, 51 Mo. 55; Hodges v. Black, 76 Mo. 537.

Judgment affirmed, in which all concur, except Hough, C. J. and Henry absent.

NEGLIGENTLY SPREADING CONTAGIOUS DISEASE—BOARDING-HOUSE—ACTION FOR DAMAGES.

SMITH v. BAKER.

United States Circuit Court, S. D. N. Y.
July 5, 1884.

Defendant took his children when they had whooping-cough, a contagious disease, to the boarding-house of plaintiff to board, and by reason of his negligence, her child, and the children of other boarders, contracted the disease, whereby she was put to expense, care, and labor in consequence of her child's sickness, and sustained pecuniary loss by reason of boarders being kept away. *Held*, that defendant was liable for damages.

At Law.

Francis S. Turner, for plaintiff. *Wheeler H. Peckham*, for defendant.

WHEELER J., delivered the opinion of the court.

The defendant took his children, when they had whooping-cough, a contagious disease, to the boarding house of the plaintiff to board, and exposed her child and children of other boarders to it, who took it. The jury have found that this was done without exercising due care to prevent taking disease into the boarding-house. She was put to expense, care, and labor in consequence of her child's having it, and boarders kept away by the presence of it, whereby she lost profits. Words which import the charge of having a contagious distemper, are, in themselves, actionable, because prudent people will avoid the company of persons having such distemper. Bac. Abr. "Slander," B 2. The carrying of persons infected with contagious diseases along public thoroughfares, so as to endanger the health of other travelers, is indictable as a nuisance. Add. Torts, sec. 297; Rex v. Vantandillo, 4 Maule & S. 73. Spreading contagious diseases among animals by negligently disposing of, or allowing to escape, animals infected, is actionable. Add. Torts, (Wood's Ed.) 10, note; Anderson v. Buckton, 1 Strange, 192. A person sustaining an injury not common to others by a nuisance is entitled to an action. Co. Litt. 56a. Negligently imparting such a disease to a person is clearly as great an injury as to impute the having it; and negligently affecting the health of persons injuriously as great a wrong as so affecting that of animals.

It is objected that the jury may have awarded damages for what the plaintiff might have prevented by sending the children away. But the jury were instructed not to give damages for anything that the plaintiff, might by the exercise of the reasonable care of a prudent person, have avoided, and it is not to be presumed that they did. The evidence was somewhat conflicting; and it does not appear that any of the findings are without evidence to support them, or are against the substantial weight of evidence; nor that the jury were actuated by any improper motives. There must be, therefore, a judgment for the plaintiff on the verdict.

Motion overruled, and stay of proceedings vacated.

NOTE.—See Current Topics.

WILL—CLAUSE IN DEED.

MATTOCKS v. BROWN.

Supreme Court of Pennsylvania.

A deed from A to B *et ux* conveyed a life estate to said B and wife. The deed contained a clause, if B should survive A the premises in question should go the "five children and their representatives of the to said B." *Held*, that this paragraph did not convert the deed into a will.

Asa Mattocks made a life lease of his farm to his father and mother, providing that after their death, if the grantor did not survive them, the property should go to their five children and their representatives. Asa married soon after, but died before his parents. The parents then died, and the five children claimed the farm. Asa left a will, and his legatee claimed that the provision in the deed for the five children was testamentary, and that as a will, Asa's marriage had revoked it. The children asserted it to be a grant. The court below held the provision to be a grant, and the plaintiffs prosecuted a writ of error.

For plaintiffs in error *Delos Rockwell* and *Mial E. Lilley*. For defendants in error *E. B. Parsons* and *Evans & Maynard*.

PAXSON, J., delivered the opinion of the court.

The learned judge of the court below committed no error in holding that the deed from Asa Mattocks to Charles Mattocks and wife was not a testamentary disposition of the property described therein. The deed conveys a present interest to the grantees. Under it Charles Mattocks and wife take a life-estate during their joint lives and the life of the survivor of them. It was not in the power of Asa Mattocks to revoke or destroy this life-estate. It was urged, however, that the con-

cluding paragraph of the deed by which it was agreed that in case Charles Mattocks should survive Asa the premises in question should go to the "five children and their representatives of said Charles," is testamentary in its character, and converted the deed into a will. Undoubtedly this provision was intended to take effect after the death of Asa Mattocks. This of itself, however, would not stamp the instrument with a testamentary character. Many deeds conveying and settling property contain provisions which become operative only after the death of the grantor or settler, but where a present interest passes to a trustee or the grantee; it has never been supposed that such instruments were of a testamentary character.

Here Asa Mattocks made a conveyance of the property in question for life, and upon a certain contingency to the children of the life-tenants. The contingency occurred. He had the power to make such a conveyance, and having made it, and the bill having vested, he had no power to revoke it by will or otherwise: Ritter's Appeal, 9 P. F. Smith, 9; Eckman v. Eckman, 18 Id. 460.

Judgment affirmed.

NOTE.—This subject was recently discussed very fully by W. W. Thornton, Esq., in an article entitled "Deeds of a Testamentary Character," 19 Cent. L. J. 64.

MONEY HAD AND RECEIVED—REVERSAL OF JUDGMENT—RECOVERY FROM ATTORNEY.

WRIGHT v. ALDRICH.

Supreme Court of New Hampshire.

Money paid in satisfaction of a judgment, to the attorney of the judgment creditor, cannot, on a reversal of the judgment with an order for restitution, be recovered of the attorney in an action at law against him by the judgment debtor.

Arthur R. Aldrich, in a suit against the plaintiff, recovered judgment, which the plaintiff satisfied by payment to the defendant, Arthur's attorney. The defendant, in good faith, applied a part of the money in the payment of costs and of other claims against Arthur, by his direction, and gave him credit for the balance on his own account against him, amounting to a larger sum. Subsequently, on a rehearing, the judgment against the plaintiff was reversed, with an order for a writ of restitution in his favor against Arthur, and for his costs. The plaintiff in this action seeks to recover the amount paid to the defendant in satisfaction of the judgment.

Ray, Drew & Jordan for the plaintiff, *E. Aldrich, pro se.*

ALLEN J., delivered the opinion of the court.

In Little v. Bunce, 7 N. H. 485, it was decided that when a judgment in favor of one party is reversed upon error or review, the only remedy for restitution is against a party to the record. The defendant here was neither patry of record nor in interest in the case of Arthur R. Aldrich v. Wright, but only attorney for the plaintiff in that action. When he collected the avails of the original judgment and applied them to his own claim, and the claims of others under the direction of his client, he was acting in good faith, in the ordinary course of business, under a judgment not then vacated, and which he could have had no reason to suppose would be vacated. The title to chattels purchased at execution sale is not affected by a subsequent reversal of the judgment, and the voluntary assignment of a note, or the payment of money by the execution debtor to the plaintiff's attorney, in satisfaction of the debt, cannot, for reasons equally good, be impeached, when afterwards the judgment may have been vacated. Little v. Bunce, *supra*, citing Hoe's case, 3 Coke (London, 1826) 181; Drury's Case, 4 Jd. 418; 2 Tidd Prac. 1138. Even if the application of the money by the defendant to the payment of a part of his own claim had not been made, but remained in his hands as a collector for Arthur R. Aldrich, it could not be recovered in this action, for the defendant was not a party to the original suit. Rex v. Leaver, 2 Salk. 587. In such a case it would be necessary for the plaintiff to proceed by trustee process, or some other equitable form of action.

Judgment for the defendant.

WEEKLY DIGEST OF RECENT CASES.

1. ADMIRALTY—SEVERAL SALVORS.

Where a tow-boat, while towing a ship from one port to another, by a slight deviation, rescues an abandoned vessel, and tows it astern to port, the tow-boat is alone entitled to salvage. *The Ephriam v. Anna*, U. S. C. C. E. D. Pa. May 5, 1884; 15 W. N. C. 15.

2. AUTREFOIS ACQUIT—SAME OFFENSE.

An acquittal on the charge of keeping liquors in a place for sale, is no bar to an indictment for keeping a place where it is reputed liquors are kept for sale. *State v. Moriarty*, S. C. Conn. 18 Rep. 203.

3. CERTIORARI—WHEN PROPER.
Certiorari does not lie to review and set aside an order of the probate court dividing and apportioning the widow's award between her and the minor children of her deceased husband by a former wife, as that court has general jurisdiction in all matters touching the settlement of the estates of deceased persons, and orders concerning the widow's award come under that general jurisdiction. The proper remedy for the party aggrieved by such an order, is an appeal to the circuit court. *Ennis v. Ennis*, S. C. Ill. May 19, 1884; 16 Chic. L. N. 390.

4. CIVIL DAMAGE—SALE OF LIQUORS AS CAUSATION.
It appeared that the father of plaintiff, while in a state of intoxication, produced in part by liquors sold to him by defendants, murdered his wife and then committed suicide. Plaintiff was fifteen years of age; he lived with, and was dependant upon his father for support. *Held*, that the facts were sufficient to maintain an action under the Civil Damage Acts. *New v. McKechnie*, N. Y. Ct. App., April 29, 1884; 30 Alb. L. J. 130.

5. COMMON CARRIER—BILL OF LADING — PUBLIC POLICY.
The libellants shipped merchandise under a bill of lading, which provided that no damage which could be insured against should be paid for. The goods were injured by sea water through the faulty construction of the ballast tank. The merchandise was insured. *Held*, that the vessel was liable. *Ohio v. The Steamer Hadji*, U. S. C. C. S. D. N. Y. July 1, 1884, 19 Rep. 198.

6. COMMON CARRIER—EXEMPTION FROM LIABILITY —FORWARDING AGENT.
Where one company receives goods for shipment beyond its line, its notice that the goods are shipped "at owner's risk," protects all the lines which may handle them until they reach their destination. *Kiff v. Atchison, T. & S. Fe R. Co.* S. C. Kan. July 3, 1884; 4 Pac. Rep. 401.

7. CONTRACT—WHAT AMOUNTS TO.
The publication by savings bank directors that "directors and stockholders are personally responsible for its debts," does not constitute a contract with those who may make deposits; but if the statement is false it lays the foundation for an action for deceit. *Westervelt v. Demarest*, S. C. N. J. 17 Vr. 37.

8. CORPORATION—CHURCHES—EXPULSION OF MEMBER.
A by-law providing that any member who should cease for a stated period to contribute to the support of the church, should have "his name dropped from the list of members" requires a vote of the society to deprive him of membership; his omission to pay does not *per se* operate as a deprivation of membership. *Gray v. Christian Society* S. J. C. Mass. Mass. L. Rep. Aug. 14, 1884.

9. CRIMINAL LAW — INDECENT EXPOSING — ELEMENTS OF CRIME.
It is not necessary that any person should actually see an indecent exposure if it was made in a public place with the intent that it should be seen, and persons were there who could have seen if they had looked. *Van Houten v. State*, S. C. N. J. 17 Vr. 16.

10. DAMAGES—BREACH OF CONTRACT TO ASSIGN INSURANCE POLICY.
A contract to assign an insurance policy to the purchaser of the insured property is a contract of sale, and the measure of damages for breach thereof is only that amount necessary to procure a policy for the remainder of the time it had to run, not the value of the house, which burned down while the promisee relied upon the fulfillment of the contract, and neglected to insure. *Dodd v. Jones.* S. J. C. Mass, Mass. L. Rep, Aug. 7, 1884.

11. DECEIT—OPINION OR FACT.
The statement by the proprietor of a storage warehouse that its exterior is fire proof is not of fact, but the expression of an opinion, and owners of property stored in the building which was destroyed by a conflagration cannot maintain an action upon such statement, for false misrepresentation, fraud and deceit. *Hickey v. Morrell*, N. Y. Ct. Com. Pl. July 1, 1884. 26 D. Reg. 321.

12. ESTOPPEL—CLAIM AND DELIVERY—PRIOR JUDGMENT—DEFENSE.
It is no defense to an action for claim and delivery of personal property that in a certain action the defendant at one time brought against the present plaintiff, to recover the same property, a judgment of non-suit was entered against him, or that the present plaintiff in a prior action against a third person for the same property, got a judgment on the pleadings for its recovery, with damages and costs. *Fleming v. Hawley*, S. C. Cal., Aug. 4, 1884, 3 W. C. Rep. 487.

13. ESTOPPEL—MISTAKE OF FACT.
Plaintiff, acting under an honest mistake of facts as to the true boundary line between his estate and that of defendant, gave defendant oral permission to build a wall on such supposed true line, and the wall was so built. *Held* that plaintiff was not estopped from maintaining a writ of entry for the recovery of his land on which the wall was built. *Proctor v. Putnam Machine Co.* S. J. C. Mass. 6 Ohio L. J. 22.

14. ESTOPPEL—RES JUDICATA.
Abandonment of an order of removal by an overseer in whose favor it is, is a bar to another proceeding for the removal of the same pauper between the same parties except upon the ground of a subsequently acquired settlement. *Cadwallader v. Durham*, S. C. N. J. 17 Vr. 53.

15. EVIDENCE—PAROL—CONTRADICTION OF TRANSFER.
A transfer of stock may be shown, though absolute to have been made as collateral security, even in a court of law. *Reeve v. Dennett*, S. J. C. Mass. Mass. L. Rep. Aug. 7, 1884.

16. LARCENY—GAMING.
Where a so-called game of chance was so operated by the defendants as to control the result in their own favor, and to allow the prosecuting witness no possibility of winning—the victim parting with his money through fraud and fear—such an offence is larceny. *U. S. v. Murphy*, S. C. D. C., 12 Wash. L. Rep. 90.

17. LIMITATIONS—PAYMENT OF INTEREST BY PARTNER—DISSOLUTION.
The payment of interest on the promissory note of the firm by a co-partner, after dissolution of the co-partnership but within six years after the maturity of the note, the payment having been made within six years before the bringing of the suit, takes the note out of the statute of limitations. *Casebolt v. Ackerman*, N. J. Ct. Err. 17 Vr. 169.

18. MASTER AND SERVANT—OMNIBUS CONDUCTOR—MANUAL LABOR.
An omnibus conductor does not come within the meaning of the words "workman" or "engaged in manual labor." *Morgan v. London* etc. Co., Eng. Ct. App. 48 J. P. 503.

19. MORTGAGE—FORECLOSURE—PERSONAL REPRESENTATIVES.
Where an executrix holding a second mortgage has foreclosed, and has purchased in the land for the benefit of the estate she represents, she is a necessary party to proceedings to foreclose the prior mortgage, but beneficiaries under the will are not. *Sockman v. Rielly* N. Y. Ct. App. Feb. 26 1884; 18 Reb. 216.

20 MORTGAGE—RENTS—PROFITS AFTER DEFAULT MORTGAGOR IN POSSESSION.
When a mortgagee suffers a mortgagor to remain in possession after default, the latter is entitled to the rents and profits. *Dowe v. Memphis & L. R. R. Co.*, U. S. C. C. E. D. Ark., April 1884, 20 Fed. Rep. 168.

21. MORTGAGE—RIGHT OF BANKRUPT TO REDEEM.
A mortgagor who went into bankruptcy, but whose estate paid dollar for dollar—and whose equity is, therefore, held by the assignees on a dry trust, which they are ready to disclaim, may maintain a bill to redeem the property, especially when in possession. *Bacon v. Abbott*, S. J. C. Mass. Mass. L. Rep. Aug. 14, 1884.

22. NEGLIGENCE—BREACH OF CONTRACTUAL DUTY.
A bridge contractor is not liable to one injured by the fall of a temporary bridge erected by him. He is liable only to those who employed him, i e., the municipality. *Marvin Safe Co. v. Ward*, S. C. N. J. 17 Vr. 20.

23. NEGLIGENCE—RAILROAD—ACT OF STRANGER.
A railroad company left a loaded car, coupled with two empty cars, standing on a switch which inclined towards their main track, the same being secured by their brakes and a railroad tie placed under the wheels of the loaded car; the cars got upon the main track and thereby an accident occurred, the plaintiff being injured. *Held*, the company was not irresponsible, as a matter of law, even though the cars could not have got on the track but for the wrongful act of a stranger. *Smith v. N. Y. etc., R. Co.*, S. C. N. J. 17 Vr. 7.

24. NEGOTIABLE PAPER—ASSIGNMENT OF PROMISSORY NOTE—PAYMENT—NOTICE.
A promissory note, in the hands of an assignee, by an assignment after maturity, is discharged, by a payment made to a payee, before notice of the assignment has been given to the maker. *Bank. v. Jones*, S. C. Cal., July 26, 1884, 3 W. C. Rep. 432.

25. NEW TRIAL—OPINION OF JUDGE—WEIGHT OF EVIDENCE.
A party cannot complain of the action of the trial judge in refusing to set aside a verdict, although confessing that it was against the weight of evidence. *Reeve v. Dennett*, S. J. C. Mass. Mass. L. Rep. Aug. 7, 1884.

26. PATENTS FOR INVENTIONS—PUBLIC ACQUIESCENCE—INJUNCTION.
When an invention is both new and useful, the want of public acquiescence cannot avail infringing parties to defeat a motion for a preliminary injunction. *Hussey Mfg. Co. v. Deering*, U. S. C. C. W. D. Pa. June 1884; 20 Fed. Rep. 795.

27. PLEADING—LOCAL ACTIONS—CASE.
An action for obstructing a private way, or highway, must be brought in the county where the road lies, the cause of action being local. *Crook v. Pitcher*, Md. Ct. App. March 26, 1884; Reporter's Advance Sheets.

28. RESTRAINTS ON ALIENATION—VALIDITY.
A restriction in a bequest of a lot of land that it should be disposed of "only by will and testament" is a valid restriction. *In re Winstanley*, Can. H. Ct. Ch. Div. June 14, 1884.

29. SALE—ACCEPTANCE—QUANTUM MERUIT.
Where, after the sale and delivery of a a lot of hops, the vendee said they were not what they were represented to be, and refused to pay the price, or any more than a certain amount, to which a reply was made them threatening suit, to which the vendor replied that, if he did not accept his figures to go ahead and sue, it was held that there was evidence of acceptance and an agreement to pay *quantum valebant*. *McClure v. Kreutzeger*, Can. H. Ct. C. P. Div. June 30, 1884.

30. STOPPAGE IN TRANSITU—POSSESSION OF VENDEE.
Where the carrier has the goods in his warehouse and the vendee requests the carrier to store them for him, he agreeing to pay all charges for freight, but not paying them, there is no delivery to the vendee in order to put an end to right of stoppage *in transitu*. *McLean v. Brethaupt*, Can. Ct. App. June, 1884.

31. SHERIFF—LIABILITY FOR KEEPER'S FEES.
A sheriff is not liable for the services of a keeper appointed by his deputy. *Lucier v. Pierce*, S. C. N. H. Reporter's Advance Sheets.

32. SUNDAY LAW—TRAVELING ON SUNDAY—LIABILITY.
A town is liable for damages happening, by reason of a defective highway, to a person illegally traveling on Sunday, if the illegality of his act does not contribute to the accident. *Wentworth v. Jefferson*, S. C. N. H. Reporter's Advance Sheets.

33. TORT — SUBORNATION OF PERJURY — ACTION FOR.
A civil action for damages does not lie against a person for suborning a witness to swear falsely in a criminal prosecution against the plaintiff. *Taylor v. Bidwell*, S. C. Cal. July 31, 1884; 3 W. C. Rep. 479.

34. TRUSTEE—DUTY OF PURCHASER TO LOOK TO APPLICATION OF PURCHASE MONEY.
Where the wife is authorized and empowered by the will of her husband, to sell and convey the real estate situate in the city of Baltimore, of which he died seised, and to invest the proceeds in productive property in the city or county of St. Louis in the State of Missouri, a purchaser from the widow of a part of said property, is not bound to see to the application of the purchase money. *Keister v. Scott*, Md. Ct. App. Mar. 29, 1884; Reporter's Advance Sheets.

35. WILL—CONSTRUCTION.
A devise in trust for B, for life with devise over to C, if B died without wife or children, gives no estate to B's wife or children at his death. *Rhodes v. Rhodes*, S. J. C. Mass. Mass. L. Rep. Aug. 14, 1884.

QUERIES AND ANSWERS.

QUERIES.

24. A recovers a personal money judgment against B. A is a fictitious person and never had any real or legal existence. Execution issues in favor of A. B sues to enjoin judgment and execution. C intervenes and claims to be the beneficiary of the judgment, but does not ask for an amendment of the judgment, but prays that proceeds of execution be paid to him. Can C recover on such plea of intervention? Please cite authorities. R. I. McCALLA.

Cameron, Texas.

25. A bought a horse of B, and in payment gave his note for $100, secured by chattel mortgage (duly recorded, etc.) At maturity of the note A had paid $80. He (A) then borrowed the remaining $20, giving his note with B as surety. The old note was given up. B as surety had to pay the $20 note. A in the mean time sold the horse to C. Can B reach the horse in hands of C to make up the debt he had to pay as surety for A? Please give citation of authorities. S. & M.

Peru, Ind.

26. Does a cross bill fail which seeks affirmative relief as to the other matters than those brought in suit by the original bill, yet properly connected therewith, when a demurrer to the original bill is sustained? B. E. B.

Salinas City, Cal.

27. When an original bill is stricken from the files, will relief ever be granted on a cross bill, which has been previously filed to the original bill? If so, under what circumstances? We want cases, no general references. A. J. P. G.

Gunnison, Col.

QUERIES ANSWERED.

Query 12. [19 Cent. L. J. 97.] A piece of property is deeded to a married woman A, "and if she should die without issue the said property to revert to her two cousins equally." After the delivery of the deed, A has issue, B, who dies in infancy. A has no other children. At her death who inherits the property? Q.

Answer. The words in a will "dying without issue" are construed to mean "dying without issue living at the death of the first taker." Faust's Admr. v. Birner 30 Mo. 414; 2 Jarm. Wills 118, side page; Moore v. Moore 12 B. Mon. 651; Alexander's Lessee v. Sussan 3 Am. Rep. 171, (33 Md. 11:) Parish v. Ferris 6 Ohio St. 563; Patterson v. Ellis 11 Wend. 260. Washburne says that "springing uses and shifting uses answer in most respects to executory devises, the difference being that the one is created by deed, the other by will." 2 R. Prop. 233, side page. 291. He says a greater degree of liberality would be exercised in construing those words in a deed than in a will. 365, side page. Tiedman on R. Prop. § 543. See Hull v. Priest 72 Mass. 18; 4 Cruise 339-340. CROSBY JOHNSON.

Query 14. [19 Cent. L. J. 97.] A devises to his daughter B a separate estate in lands. B sells the lands and re-invests the proceeds in other lands and accepts a deed, containing no clause showing a separate estate. Can these lands be treated as the separate estate of B? Can B convey them without her husband joining her in the deed? Is it permissible to show *dehors* the deed a separate estate? Has the husband a curtesy right in the land? Cite authorities. RECTUS.

Kansas City.

Answer. These lands cannot be treated as equitable separate estate. They are simply lands acquired by a married woman during coverture by purchase It would be otherwise were it a case of personal property, for goods bought by a married woman with her separate property are separate property; see Pike v. Baker, 58 Ill. 163, 167; Ireland v. Webber, 27 Ind. 256, 259; Beal v. Storm, 26 N. J. Eq. 372, 376; Merritt v. Lyon, 3 Barb. 110, 114; and in the case of any oral acquisition the intent to exclude the husband's rights may be proved by any facts attending such acquisition; Watson v. Broaddus, 6 Bush. 328, 329; Welch, 63 Mo. 57, 60; Pond v. Skean, 2 Lea, 126, 130, 131; Porter v. Bank, 19 Vt. 410, 419. But in the case of a deed or other written settlement, while the court will search the four corners of the document and be satisfied if the necessary intent to create a separate estate appears in any part thereof; Morrison v. Thistle, 67 Mo. 546, 599; and while it will allow the deed to be controlled by an agreement between the husband and wife ante-nuptial, Klenke v. Koltze, 75 Mo. 239, 243, 244, or post-nuptial, see Dula v. Young, 70 N. C. 450, 453, it will not allow an ordinary deed to be changed by parol into a deed to the wife's sole and separate use, Paul v. Leavitt, 53 Mo. 595, 598, applying rigorously the rule that the terms of a document may not be altered by oral evidence: Stephen's Dig. Evid. Art. 90. In a case of fraud it might be different; see Tillman, 50 Mo. 40, 42. Under the Kansas laws (sec. 3137) a wife may convey her statutory separate estate alone, but to defeat his rights as survivor, he must join (see § 2129). He has no curtesy but another estate in lieu thereof, if he survives her (§ 2129).

Baltimore, Md. DAVID STEWART.

Query 19. [19 Cent. L. J. 117] B owned land—leased it to C for a term of years with option in the lease terms to purchase on a credit, for a stipulated sum, executing purchase money notes therefor, payable to B in the future—at a time named. B, during the lease term made will and died, up to which time C had not exercised his right to purchase, and had executed no purchase money notes to B; but B, under the belief that C had done so, made disposition of the supposed notes of C as legacies to various persons. What rights have such persons, under the will? But further—After the death of B, C during the lease term, exercised his option to buy—did so—and executed his notes payable to B's executor at the time agreed on between B & C. Then what are the rights of the legatees of the supposed notes under the will of B? W., H. & W.

Answer. If B's will can be fairly construed as disposing of his estate in the leased lands, it must be so construed, pursuant to the rule that it will be presumed that one who has made a will did not intend to die intestate as to any part of his estate. Farish v. Cook, 78 Mo. 213; Winchester v. Foster, 3 Cush. 366; Leake v. Robinson, 2 Mer. 385. Although B did not in express terms dispose of the land which he owned subject to the conditions of the lease contract, yet it is clear from the statement that he intended his legatees to have the benefit of his interest in the land. He supposed his interest in the land was represented by notes of the lessee and intended the legatees to have the proceeds of such notes. Can this manifest intent be effectuated consistently with the rules of

law, or must it be held that as to the land the testator died intestate?

The mistake of B (assuming there was a mistake) is not apparent on the face of the will. The will assumes the existence of the notes and bequeathes them. If there had been such notes they would have passed by the will; but they only had an existence in the imagination of the testator. The fact of their non-existence could only be made to appear by extrinsic evidence. In Kerr on Fraud and Mistake, p. 448, it is said unless the mistake is "apparent on the face of the will there can be no relief" and on p. 449 it is said: "The mistake must be a clear mistake, or a clear omission, demonstrable from the scope and structure of the will." "Nor will a mistake be rectified if it does not clearly appear what the testator would have done in the case if there had been no mistake." Prof. Pomeroy has used about the same language, (Eq. s. 871.) In a note to that section he says "the only possible modes of correcting mistakes in wills are by transposing, rejecting or supplying words or clauses." And further on in the note in speaking of misdescriptions of persons and property, he says. "Such misdescription being discovered by extrinsic evidence may be harmonized, explained and made effective through the instrumentality of such evidence. But it should be carefully observed that this process of adjusting the description to the actual conditions of fact is in no proper sense a correction of mistakes." All the cases agree that all the circumstances surrounding the testator at the time the will was made may be shown and the will read in the light thereof. Abb. on Trial Ev. 136; 1 Greenl. Ev. §§ 287, 291. Jarman on Wills 349 (side page.)

When B entered into the contract by the terms of which the lessee became entitled to own the land by executing certain notes or performing certain prescribed conditions it constituted an equitable conversion of the real estate into personal property, and B thereafter held the legal title as trustee for the purchaser, Pomeroy's Eq. sec. 1161. The fact that the contract allowed the purchaser an option would not prevent it working a conversion. "Where a lessee with an option to purchase duly declares his option after the death of the lessor or vendor who is the owner in fee the realty is thereby converted retrospectively as between those claiming under the lessor or vendor, or under his will." Pomeroy Eq. sec. 1163, citing a number of cases, which support his text. After the election to purchase, B's interest became personalty and his personal representative, (not the heir,) would have been entitled to have received the purchase money for the land. In bequeathing the notes, (which by the same doctrine of relation would be presumed to be in existence from the time the contract was made,) the testator acted in exact accord with the view of his rights which a court of equity would have taken. Courts have gone greater lengths to sustain bequests than would be required in this case. Thus, where a testator bequeathed his "4 per cent. stock," and it appeared that several years before making his will he had disposed of all that stock and invested the proceeds in "long annuities," it was held the long annuities passed under the bequest. Selwood v. Mildmay, 3 Ves. Jr. 306. And where a testatrix bequeathed certain described consols, and it appeared that she had no such consols at the time of making the will or afterward, but she had previously owned such and had sold them and loaned the proceeds at the same rate of interest it was held the bequest carried the proceeds. Lindgren v. Lindgren, 9Beav. 358.

While as a matter of fact real estate has a fixed and stable nature, in contemplation of law as between heirs and devisees it has just such character as the testator by his contracts or will has seen fit to impress upon it. Johnson v. Bennett, 39 Barb. 237; Eagle v. Emmett, 4 Bradf. 117; Chase v. Lockerman, 35 Am. Dec. 277 (11 Gill & J. 185;) Noyes v. Mordaunt, 2 Vern. 581; Jarm. on Wills, 522, (side page.)

Hamilton, Mo. CROSBY JOHNSON.

RECENT LEGAL LITERATURE.

THIRTY-FIRST KANSAS.—Reports of cases argued and determined in the Supreme Court of the State of Kansas. A. M. F. Randolph, Reporter. Vol. 31. Containing cases decided at the July term 1883, and the January term 1884. Topeka, Kansas, Kansas Publishing House, 1884.

The Supreme Court of Kansas can claim credit for many things which go to make up the favorable opinion which courts should command from the profession. It had at Judge Brewer's retirement, three able judges, Chief Justice Horton, Judges Brewer and Valentine. Judge Brewer had the blood of Field "flowing in his veins" and it is not surprising that the stock which produced so shining a light to jurisprudence as Judge Field, of the Federal Supreme Court, should be likewise responsible for the existence of another jurist like Brewer. Judge Horton has just received the compliment of a re-nomination which shows abundant appreciation of his labors at home, and it is an old adage that the opinion of one's neighbors is the one to rely upon. Judge Valentine deserves the same compliment. The opinions of this trio have been worthy contributions to the law, and so far as we have been able to observe have, except perhaps on a very few occasions, escaped that criticism which is so plentiful nowadays that as Judge Henry says "it will die by the wayside." Gov. Glick appointed Judge Hurd to succeed Judge Brewer upon his retirement. We know very little about Judge Hurd, but we believe that he was a prominent railroad lawyer, and his appointment was well commended. Another thing commendable in the Kansas Supreme Court is its promptness in doing its business. No cause is left over for the next month. The business of the court is cleared every month, and when Judge Brewer left it, everything was in "apple pie" order for his successor.

The decisions which appear in the present volume have, so far as they were of importance, been published in the Journal either in full or in digested form, and require no special comment. About the usual number of decisions have been reported in this volume. It is surprising that three judges can dispose of so much business which so large and growing a State as Kansas, must give to her appellate court.

REED ON STATUTE OF FRAUDS. A treatise on the Law of the Statute of Frauds and of other like enactments in force in the United States of America and in the British Empire. By Henry Reed of the Philadelphia Bar. In three volumes. Vol. 2. Philadelphia. Kay & Bro. 1884.

The second volume of this excellent work has appeared, and is before us. The book is not made up of mere padding. Every sentence says something distinctive from that contained in one preceding or following. It is written in a style which will make it popular. Benjamin is seen

once more. This is undeniably one of the best books which have appeared of late. The mechanical execution of this volume is of that excellence which distinguishes all of Kay & Bro.'s publications.

AMERICAN DECISIONS. The American Decisions, Containing the cases of General Value and Authority, Decided in the Courts of the Several States from the earliest issue of the State Reports to the year 1869. Compiled and Annotated by A. C. Freeman, Counselor at Law and Author of "Treatise on the Law of Judgments," "Co-tenancy and Partition," "Executions in Civil Cases," etc. Vol. 56, San Francisco, 1884; A. L. Bancroft & Co.

This volume contains the decisions of seventeen States in 1851 and 1852. The valuable notes in this volume are upon Form and Contents of Administrator's Deeds; Dormant Partners; Affiliation; Bastardy; Assignment of rights to maintain suits in equity; Taxation as to place; Property manufactured to order; Assignment of insurance policies.

LEGAL EXTRACTS.

A SKETCH IN AN AMERICAN COURT.

Alighting from the street-car at one of the busiest corners of the city, we are confronted by a statue of white marble, representing a man *sejant*, whom it requires but little intimacy with the national monumentology to recognize as the ubiquitous *Pater Patriæ*. He is apparently keeping watch over the main entrance of a dingy-looking red-brick building, solid but unpretentious. But the marble janitor makes no sign, and no man pries into our business or bars the door to curiosity. We climb the worm-eaten stair case unchallenged, and wander idly on till checked by a plain white-painted door, above whose lintels are the words "Common Pleas No. 3." It swings open at a push, and, entering, we find ourselves in a square room of fair size, lighted from two sides by several windows, all of which are double-sashed to exclude the jingling of the horse-car bells and the multifarious noises of the outer world. Facing the door is a long raised desk-table, occupying about half the side of the room, and shaped in an arc of a circle, the concavity being towards the body of the room. Books and papers are piled or scattered on this table, behind which, at the apex of the arc, sits an elderly man of strikingly handsome and intelligent appearance—the judge of the court. He is in ordinary morning dress, and is busily engaged in revising the notes he has made during the progress of the case in hand—an occupation which does not apparently interfere with keen attention to what is passing around him.

Round the other three sides of the room, at a distance of about eight feet from the walls, runs a wooden railing some four feet in height, forming a barrier between those concerned in the present business of the court and the mere spectators like ourselves, who are accommodated with seats on a double row of benches ranged round the wall outside the charmed square. Within the inclosure, to the right-hand side of the bench, two rows of chairs, twelve in number, are arranged at right angles to the chord of the arc; and on these chairs, in various attitudes indicative of attention, indifference, and repose, are seated the "twelve good men and true" upon whose verdict the issue of the trial depends. They are all apparently of the tradesmen class, and here and there among their number one sees the dark skin which proclaims its wearer to be not many degrees removed from African parentage. A closer inspection of the jury reveals the curious fact that the jaws even of the most somnolent are moving slowly and ruminatively, as if engaged upon some toothsome cud; near them are some spittoons. In front of the jurymen is a plain deal table with a few books and rolls of paper littered on it. The rest of the enclosure is studded with a score or so of comfortless-looking bent-wood chairs, and occupied in groups by the parties to the suit and their witnesses and legal advisers. Another deal table in front of the bench accommodates the clerk of the court; and a few battered metal spittoons and a register stove make up the remaining equipments of the Hall of Justice.

The plaintiff in the present case appears to be a puny, sickly-looking boy of about twelve years of age, one of whose hands is enveloped in bandages, and who appears, through his 'next friend,' to claim damages for injury caused by the negligence of his employer, the defendant—a hard, shrewd-faced middle-aged man, who is lolling at his ease on a chair close in front of the jury, with his legs resting across the seat of another chair at a convenient distance. Seated negligently on a corner of the table facing the jury and carelessly dangling his feet in mid-air, is a young man, plainly dressed, whose eloquent appeal to the jury proves him to be acting as counsel for the defendant. Despite the nonchalance of his attitude and bearing, it is at once evident that he is fully alive to the interest of his client and the difficulties of his case; and his speech for the defence is logical and plausible. The sympathies of his audience are sure to be enlisted on behalf of the injured child; and he therefore appeals strongly to their business instincts as employers of labor on behalf of a brother tradesman. In some small matter of detail, a date or name, the judge has occasion to interrupt and suggest a correction. The young advocate merely recognizes the interruption with a quick glance round toward the bench and the words 'Is that so?' and then adopts the emendation and continues his address with no further sign, respect, or regard for authority. Presently he brings his speech to a close with an impassioned appeal to the honesty and impartiality of his hearers; and then, slipping from his perch, he saunters carelessly across the court, exchanges a few laughing remarks with his client, bites a corner off a plug of tobacco which he produces from his pocket, expectorates meditatively, and finally drops into a chair to hear what reply his opponent is prepared to give.

Meanwhile an elderly man, tall, gaunt, and awkward-looking, has stepped nervously up to the vacated place, and stands facing the jury, leaning heavily forward with his hands planted on the table. He begins speaking in a low tone, and with monotonous delivery merely restating the facts of his client's case; but presently a change comes; and, warming to his work, he waxes eloquent and indulges in a savage personal attack upon the character and motives of the defendant. Involuntarily we turn to look at the man who is being described to the assembled crowd as 'this greedy employer of cheap labor,' 'this man without heart or conscience, who pays children twenty-five cents a week to do work which would be full of peril for grown men,' this, &c., &c., but are surprised to find that, instead of writhing

under the sarcasms levelled at him, he still reclines in his former ungraceful attitude and accepts the compliments with an indifferent smile. The appeal for helpless childhood follows as a matter of course: but, passionate as is the language and cleverly as the points are made, they elicit no sign from the inanimate twelve. Then, after a few minute's silence, the judge proceeds to sum up the case, his cool, impartial statement and shrewd analysis contrasting strangely with the addresses that preceded it. In ten minutes he places the jury in possession of the legal aspect of the case, and then he dismisses them to consider their verdict. Each in turn rises, stretches himself, addresses himself to a spittoon, and saunters after the foreman; and as they leave the court we too rise and retire, to ponder upon the majesty of law stripped of its externals and its traditions of respect.—*St. James's Gazette*.

IT WAS SIMPLY ABSENT-MINDEDNESS.

"Did you see the defendant drink?" asked the attorney of the witness. "I did not," replied the witness. "Why then, do you think he was drunk?" "Because he was on his way home from the convention and attempted to wind up the door-knob with his watch-key." "Is that your only reason for swearing that the defendant was drunk?" "Yes; but I think that is reason enough. "Your honor, the court," said the lawyer springing to his feet, "the witness is unable to distinguish between absent-mindedness and drunkenness. Such evidence as this is preposterous, and if entertained would convict all of us. Why, even the court would not escape. Your honor knows that the court last night bit the end of a cucumber pickle, stuck it in his mouth, scratched a tooth-pick on his pants, and tried to light it for a cigar. Of course your honor was thinking of a case——." "Yes," said the court, "I was thinking of a case—a case of beer. I was absent-minded. The case is discharged."

LITERARY PROPERTY.

We are glad to see that lectures, even when delivered orally, are within the protection of the law, and that persons publishing them for profit without the consent of the lecturer can be restrained by injunction. Mr. Justice Kay, following the law laid down by Lord Eldon in Abernethy v. Hutchinson (3 L. J. O. S. 209, Ch.) has thus decided in the recent case of Nicols v. Pitman. The lecture in question was delivered orally at a college by the plaintiff, who before delivery had committed it to writing. The defendant attended and took the lecture down in shorthand, and subsequently published it in shorthand characters. It certainly seems only in accordance with justice that a person who has devoted time and learning to amassing the necessary material for a lecture should be protected from having it published by any person who is capable of writing shorthand. It is to be noticed that in this case the lecture, prior to delivery, had been reduced into writing, and it was therefore contended that the plaintiff had a copyright in it, which he was entitled to have protected. Lord Eldon's decision in Abernethy v. Hutchinson (*ubi sup.*) however, goes further than this, his Lordship there deciding that a person orally delivering a lecture, even though it has not been committed to writing, is entitled to an injunction to restrain other persons from publishing it. According to Lord Eldon there is an implied contract between the lecturer and his audience that, while they may make the fullest notes for their own personal use, they may not publish them for profit. Even putting aside this implied contract, a lecturer might well argue that he had such a property in his lecture, even though it be not committed to writing, as to entitle him to relief against piracy. A lecture which is not committed to writing differs from a literary composition only in the way in which its subject-matter is conveyed to the knowledge of the public. In the one case it is the voice, in the other printed characters. The language and sentiments, which are the substance of the matter, are in both cases the same. This case was somewhat anomolous from the fact that the publication complained of was in shorthand characters. This was somewhat relied upon by the defendant, but the learned judge, not unnaturally, refused to be influenced by a circumstance, the only practical effect of which is to limit the number of readers of the publication.—*Law Times*.

NOTES.

——In the article on "Value of the Human Body" the judgment in Houfe v. Fulton, 34 Wis. 408, was stated to be for $27,500. It seems it was but $2,750, the error being that of some one other than ourselves.

——In Reg. v. Rowlands 17 Q. B. N. S. 671,684, Lord Coleridge said "It has been held of late here that the courts have more common sense than some of the old decisions give them credit for." The courts used to doubt their own possession of common sense, and then wondered why the people and sometimes the bar doubted the same thing.

——Some one has said "Write a book and die." Judge Rorer believed in writing four books and dying. The hand that wrote "Rorer on Judicial Sales" and "Rorer on American Inter-State Laws" will write no more. The learned old judge who did his best to lighten the burdens of his professional brethren in the walks to which he devoted his ripe and able intellect now sleeps in the cold, heartless ground where no criticism can reach him, and no praise can "tickle" his ear. For a few days only after the publication of his last effort, "Rorer on Railroads," was he permitted to remain with men; it was the dictate of some uncontrollable power that some one else should smile upon the success which may greet the appearance of his last contribution to the legal literature whose increasing proportions are becoming frightful to the profession. We are enjoined to say naught but good of the dead, but this certainly cannot extend to prohibition of of criticism of the dead man's works.

——"What is the charge against this man?" asked the police judge as an old negro was arraigned at the bar. "Drunkenness," replied a policeman. "Old man, you took more than one drink, didn't you?" "Took fifty, sah." "You were not drugged?" "No, sah." "Do you think that the officer had a right to arrest you?" "Yas, sah." "Are you a preacher?" No, sah." "Did you ever steal a shanghai rooster?" "Many a one, sah." "You don't claim to be honest?" "No, sah." "You have sold your vote, haven't you?" "Yas, an' fur a powerful little money." "Are you going to get drunk again?" "Yas, sah." "This is a very remarkable man," said the police judge. "Here, old fellow, is a ten dollar bill. Such straightforwardness should be rewarded."